87-1582
No. _____

Supreme Court, U.S.
FILED
DEC 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM 1987

In the Supreme Court
OF THE
United States

FRANK BORING FITZGERALD,
APPELLANT,
vs.
STATE OF MONTANA, DEPARTMENT
OF FAMILY SERVICES,
GENE HUNTINGTON, DIRECTOR
RESPONDENT. 1/

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA 2/

JURISDICTIONAL STATEMENT

APPEARANCE: FRANK BORING FITZGERALD
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APPELLANT, PRO SE

1/ FORMERLY DEPT. SOCIAL & REHABILITATIVE SERVICES, DAVE LEWIS, DIRECTOR.
2/ CASE BELOW, 86-538, IN RE: MGM, YOUTH IN NEED OF CARE. 741 P2 770.

QUESTIONS PRESENTED

1. Wrong statutes used against Appellant in the beginning; Guardian Ad Litem sided with State, making Appellant and child adversaries.

2. The State and lower court went first to best interests of the child thruout this case, absent first find parent unfit.

3. Stay Orders and Decision on first appeal were disregarded. Appellate court found no evidence in record harm would come to child on visits or living with Appellant.

4. "Least restrictive" and other provisions of USCS Title 42-601 et seq., were disregarded: Appellant's child given a new name, a new religion, 300 mile distance, no visits and foster care for half her life.

5. Judge sat 1-1/2 years on State motion for a new trial denied by Appellate court in 2nd appeal.

6. Stipulation, put into place without court order, was in nature of a Bill of Attainder, and, in nature of Executory Contract Adoption.

7. Appellate court allowed "clear and convincing evidence" doctrine did not require full and fair trial but relied upon State evidence absent defense.

8. Infringement of Rights was not sufficiently drastic to invoke constitutional protections.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Frank Boring Fitzgerald, Appellant

v.

State of Montana, Department of Family Services, Gene Huntington, Director (Formerly, Department of Social and Rehabilitative Services, Dave Lewis, Director)

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

(Case below, 86-538, In Re: MGM, Youth In Need Of Care) (741 P.2d 770)

Frank Boring Fitzgerald, Appellant, respectfully petitions, his appeal be heard to review judgment of the Supreme Court of the State of Montana entered on August 20, 1987 and made final on September 17, 1987 by its denial of a petition for rehearing.

OPINION BELOW

The August 20, 1987, opinion (Mt.Sup.Ct.

86-538) of Montana's Supreme Court is found as Appendix A. The September 17, 1987, denial of petition for rehearing is found as Appendix B. The September 2, 1986, decision (DJ 79-188) of lower court, which formed the basis for appeal 86-538, is found as Appendix C.

OTHER OPINIONS AND DECISIONS BELOW

An earlier lower court decision, June 29, 1981, (DJ 79-188) is found as Appendix D. The December 9, 1982, opinion (81-523) of Montana's Supreme Court reversing that decision is found as Appendix E-A, and 2 stay orders on that decision are found at E-B and E-C. Montana's Supreme Court April 28, 1983 (83-120), denial of a Writ of Review or a New Trial to County Attorney is found as Appendix F.

JURISDICTION

For this appeal, jurisdiction of this Court is invoked under 28 USC Sec 1257(2),

because, Appellant was not afforded a full and fair hearing, required by the US Constitution; And, State statutes, and procedures, under which a partial hearing did take place, were repugnant to the Constitution; And, events have taken place thruout this case which are at variance with this Court's decisions.

Alternatively, Count one, if, this appeal does not lie to this Court, then the papers should be treated as petition for writ of certiorari pursuant to 28 USCS Sec 2103(1), as was Kulko v. Superior Court of California, 436 US 84, reh den 438 US 908.

Alternatively, Count two, if above two USCS statute sections do not invoke jurisdiction, because there are outstanding issues to be resolved in areas of 11 year retention of the child in foster care, lack of full and fair hearing, misapplication of law, the papers should be treated as petition for a writ of habeas corpus pursuant to 28 USCS Sec 2254(a)(b)(c).

QUESTIONS PRESENTED

1. Whether Montana Supreme Court erred in 81-523; again, in 86-538 when it declined to rehear on the issue raised therein; lower court and procedures erred allowing the State and court to unconstitutionally apply the wrong statutes to assume jurisdiction over Appellant in the beginning. To permit Guardian Ad Litem to side with the State, presuming Appellant and his child were adversaries contrary to decisions of this Court.

2. Whether Montana Supreme Court erred in 81-523; again, in 86-538 when it declined to rehear on the issue raised therein; allowing lower court to wrongfully go only to the best interests of the child from the beginning. To permit the State to enforce its view, supported by Guardian, of what constituted best interests of the child, absent first a finding of unfitness of Appellant contrary to decisions of this Court.

3. Whether in 81-523, Montana Supreme Court stay orders and reversing decision were disregarded by State, lower court, the Guardian Ad Litem, and the private agency, infringing Appellant's Constitutional Rights and harmful to his parent-child relationship. To permit Appellant to be deprived of due process and equal protection of law in view of Montana Supreme Court finding no credible evidence in record to indicate harm would come to his child if she lived with or visited Appellant, and then for the system to prevent even visits.

4. Whether Montana Supreme Court erred in 86-538 when it declined to rehear on the issue raised therein, allowing as harmless to the parent-child relationship, State or private agency non-compliance with USCS Title 42-601 et seq: Failure to recognize wishes of Appellant and blood relatives as to temporary "least restrictive" foster care; Appellant's child given

new name, new religion, 300 mile distance, no scheduled visits and foster care a total of 11 years; Failure to allow Appellant to sit on administrative foster care review committee.

5. Whether in 86-538, Montana Supreme Court erred when it declined to rehear on the issue raised therein, allowing as harmless to parent-child relationship, and to Appellant's Constitutional Rights, lower court judge failing to act for a year and a half on State's motion for a new trial, which new trial had previously been denied in 83-120 Mt.Sup.Ct.

6. Whether in 86-538, Montana Supreme Court erred when it declined to rehear on the issue raised therein, allowing as harmless, the Stipulation, being put into place without court order by the attorneys, was in the nature of an Executory Contract Adoption, in the nature of a Bill of Attainder.

7. Whether in 86-538, Montana Supreme

Court erred allowing as harmless, "clear and convincing evidence" doctrine of this Court does not require a full and fair trial at which an adequate defense is afforded, rather, unconstitutionally the court there relied exclusively on State evidence absent a defense.

8. Whether in 81-523, 83-120, and 86-538, Montana Supreme Court erred holding, in effect, infringement of Parental Human Rights was not sufficiently drastic to have invoked constitutional safeguards and protections at many points in this 9th year case.

MONTANA AND US CONSTITUTIONAL PROVISIONS, AND, MONTANA AND US STATUTES INVOLVED ARE CITED IN THE TABLE OF AUTHORITIES AND ARE PRINTED IN APPENDIX J, ap 132 , and L, ap 147 .

STATEMENT OF THE CASE

For a quick case overview the past 8-1/2

years, see Appendix K, ap 137 .

Appellant charged his Constitutional Rights were violated in those proceedings near the beginning. There have been many such violations.

In briefs, in and out of court, the State supported the Guardian and he supported the State. Doing so he pitted child against Appellant as adversaries.

Appellant maintains, foster care historical developments helped the State to forge new ways of separating child from parent. Ways not found in the statutes of Montana nor of the United States, nor of common law of this land.

According to official accounts, while in TIA foster care, precise examination of the child by a pediatrician, nothing was found to support original report used against the mother in TIA. Later, the original allegation was again directed at Appellant thru his two hired psychologists and a psychiatrist.

Long-term foster care was accomplished in the best interests of the child due to her mother's apparent mental illness. (That foster care placement discounted the American Indian blood line; the many blood relatives of the child, and the officially recognized godmother ready to take her into their homes on a temporary basis.)

The mother denied paternity acknowledgment and Moore v. Fitzgerald paternity dispute arose. The State became involved, unconstitutionally because there existed no specific statutory authority for the State to enter that private contest.

In the best interests of the child, the mother's Rights were terminated, by order of April 3, 1980. In that same order the judge unconstitutionally ordered the State to take all steps to place at issue in that case, the claim of Appellant to be the father in paternity dispute case.

The blood tests were run and proved 97.6% certain.

The State made the assumption, Appellant was the natural father (but not then adjudicated as such) but kept the child in foster care. Under those conditions, in regards to Rights of the child, that amounted to a violation of the 8th Amendment: Cruel and unusual punishment to the child for something it did not do.

The State then got approval of the judge for then putative father to unconstitutionally comply with stipulations requiring he submit to invasion of his privacy under color of law. The State was able to later change their specifications so as to be directable at putative father leading to further foster care.

State staff tried to show the child was afraid of putative Appellant. For this purpose, two visits were supervised in July of 1980 by an RN.

The State's intent was contained in the June 5th Stipulation #5: "...pending the termination of suitability of placement

with Frank Fitzgerald."

With the Guardian Ad Litem filing under Title 40 for termination, and the State under Title 41 for termination, consolidation of the two positions was granted over Appellant's objections. It was unconstitutional, following conclusive adjudication of paternity on November 17, 1980, to automatically put Appellant's Parental Rights on trial in the Title 40 best interests of the child. That was unconstitutionally required by Title 40.

It was unconstitutional for the Guardian Ad Litem to petition to terminate in consolidation with the State. That was a new form of double jeopardy. In the meantime, the child was examined by the same psychologist Appellant earlier hired to comply with court order of June 5, 1980. That expert told State staff in a confidential letter, the child, "would be an excellent candidate for adoptive placement", and, his findings the child was very bright and

adaptive might upset the procedures. Why? Because the State had at that time as its goal, "adoption" by the foster care providers who had signed adoption papers.

Appellant discovered in the file: "State's Report April 22, 1981 stated, "how soon can permanency be established for the child?" "Years - if father doesn't obtain custody he will appeal to state and federal" "Retain child in foster family." "Foster family has alcoholic problems."

Appellant's newly discovered evidence shows trauma of child abuse and neglect at hands of the State, causing emotional scars to Appellant's child later brought to bear on Stipulated visits, that foster mother today, divorced from her husband, gives an account of those days of terror (see Appendix G, ap 98). His child has foster care induced emotional scars brought to bear upon visits with Appellant in his family, because she cannot express herself to anyone else but her stepmother

who has known the child all of her life.

Hearings on the best interests of the child concluded with Appellant's Parental Rights terminated on June 29, 1981, not on unfitness to parent his child. Appeal 81-523 was a reversal and said it was error to terminate on best interests.

As to constitutionality question, on the last page of that June 29, 1981, Order, Paragraph #3: "Motion of Frank B. Fitzgerald to dismiss these proceedings on the ground Uniform Parentage Act (of Title 40) is unconstitutional is Denied."

Altho not specifically referred to as unconstitutional, application of Title 40 to Appellant, as Issue 1, was ruled error.

Stay orders and the reversing decision on appeal 81-523 had no effect on foster care circumstances, and, no effect on State's litigation.

After the first appeal, 81-523, the Guardian continued to pit child against

Appellant as adversaries.

Following issuance of the 1st remittitur, to avoid contempt of court, County Attorney fled to Mt.Sup.Ct. seeking a review or a new trial. Briefs he and Appellant filed in 83-120, said the judge was without jurisdiction to order a new trial.

The 83-120 remittitur did not get cross-referenced in lower court's file.

1-1/2 years later, the judge granted the State's motion and ordered up a new trial.

Whether new trial was constitutional or not, Appellant hired 2 more psychologists coordinated by a psychiatrist. Their favorable reports were not admitted into evidence only delivered to opposing attorneys under court ordered discovery. The psychiatrist's report to the court was entered into the court's file. It is found as Appendix I-A, ap 111 . Also see I-B, ap 127, by the same doctor 5 years earlier.

The judge refused to hear anymore of the

case instead he wanted a settlement or he would write a decision no one could appeal. That statement was heard out in the courtroom by Appellant.

A Stipulation in the form of an Executory Contract Placement very similar to an Executory Contract Adoption prohibited by common law of Montana, effectively a Bill of Attainder, was put into effect by the three attorneys without court order at the time. It permitted 2 three week visits with her own family. It called for the child to be examined by another psychologist and a psychiatrist, and the Guardian ad Litem, weekly.

The private agency having the child in foster care paid for the psychologist who reported to the Guardian. Only the direct observations of interaction effects would be permitted to be written into his report. Tho his report was not enough to return the child to foster care, the State did return the child to foster care with-

out benefit of the court's action.

In an attempt to get his child back into her own family, Appellant called the Guardian Ad Litem saying he read the report which said "some" impairment. "Substantial" impairment was required by the standard of the statutes to keep the child in foster care and terminate Parental Rights.

A contempt proceeding against the State and the Guardian failed largely because the Guardian's attorney got the psychologist to change his mind after the fact of the written report saying "some". He signed an affidavit saying "substantial impairment", even tho not specifically committed by act of commission or omission of Appellant. This was testified to at a later hearing. It was enough at the time to retain the child in foster care again without the court's action.

After the fact of the child going back into foster care, the Stipulation order

was signed by a judge, in effect, making it in the nature of, and similar to, an ex post facto law.

A secret hearing on question of discovery was held March 8, 1985, in which on the record the judge as much as called Appellant a criminal, and, he was not to be informed of this secret hearing nor its content until he called up the transcript on final appeal. And, any in camera produced documents were to be kept from Appellant in attorney's files only. If Appellant had known at the time what was going on without his knowledge, the Stipulation would never have come about. Unconstitutionally, this knowledge was kept from him so as the Stipulation could be put into place leaving the child in temporary foster care for the remainder of her childhood. Appellant's attorney confessed he thought the child was better off in foster care and if not signed, the child would be immediately returned to foster

care.

That background info did not appear in final appeal briefs. So Mt.Sup.Ct. said, in effect, the only reason its first decision was issued was so lower court could give the State a second chance to terminate. That went only to the best interests of the child.

Those briefs did not tell of the denial to County Attorney of his request for a review or a new trial in 83-120 Mt.Sup.Ct. Petition for Rehearing.

A personal prayer to Mt.Sup.Ct Chief Justice, dated September 23, 1987, pointing to new and significant evidence, (see Appendix G ap 98), asked for time to evaluate it, and a stay order, drew no reaction and none is expected. Therefore, Notice of Appeal to the US Supreme Court was filed October 1, 1987 and served on all parties in interest.

While the child was in foster care, the State violated federal laws under color of

state law:

Mail to the child was interferred with. There was no restraining order concerning the child receiving mail; and,

The child was taken across state lines at least 4 times without any court order contemplated in 41-3-103(1)(b), MCA (1985). The foster care providers in 2 previous summer are known to have said they would take her to Canada; and,

Provisions of USCS Title 42-601 et seq. have been violated in regards "least restrictive" foster care placement; failure to respect family wishes as to foster care placement; failure to provide the opportunity for Appellant to sit on foster care Review panel; and intent of Congress on returning foster care children to their parents.

REASONS FOR GRANTING THIS APPEAL

The decision 86-538 Montana Supreme Court is in conflict with United States

Statutes and decisions of this Court on the questions raised.

This case presents unique ways to retain a child in the hands of the State.

Foster care is effectively detention of the child in State hands with no practical way for Appellant to extract her from the system. This is color of law without regard to Constitutional Rights, Civil Rights, or most importantly, Human Rights.

The lower court refused to follow the remittitur of its appellate court and make further findings, instead it ordered a new trial, denied above, and then instructed the parties to settle.

Courts cannot make law, only the legislature can. Nowhere in statutes is there to be found the matter of a Stipulation requiring Appellant's child be detained in foster care witout first complying with his Constitutional Right to a full and fair trial.

ARGUMENT

1. WRONG STATUTES USED AGAINST APPELLANT IN THE BEGINNING; GUARDIAN AD LITEM SIDED WITH STATE, MAKING APPELLANT AND CHILD ADVERSARIES.

Montana's Supreme Court erred, and its actions unconstitutional, by its not recognizing, the State and lower court applied the wrong statutes[1] to assume wrongful jurisdiction[2] over Appellant in the first

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1/ See 81-523 Opinion Mt.Sup.Ct. Uniform Parentage Act of Title 40, MCA, was used against Appellant by Guardian Ad Litem seeking termination of Parental Rights. Abuse and neglect of Title 41 was used against Appellant by the State seeking termination of Parental Rights. The State supported the Guardian Ad Litem in his action and he supported the State in their action. Jointly they succeeded at consolidation, later ruled err and the Guardian had no standing to bring such action.

2/ See P38, Par."L" of Amicus Curiae Brief in support of Petition for Rehearing, Mt.Sup.Ct. 86-538, Sept. 1, 1987: "While Title 40, Chapter 6, Part 1 was the part, Section 40-6-112, Appellant relied on to get his paternity claim action undertaken by jurisdiction of the court under 40-6-109(1), subsection (2) therein did not, at that time, apply because the blood tests had not been conducted. Court's personal jurisdiction of Appellant Section 40-6-109(2), did not occur until not only the blood tests were conducted but adjudicated. Which adjudication resulted in its order of November 17, 1980, 9 months later. Following adjudication conclusively establishing "putative" father seeking blood tests, as "natural" father, Section 40-6-109(2) personal jurisdiction then

place in 1980.

The State automatically presumed Appellant, an unwed father, and his child were adversaries.[3] The State automatically challenged and presumed[4] he was unfit to parent absent the prerequisite proper hearings which could lead to conclusive jurisdictional decision of unfitness.

Appellant's Rights were violated at an early stage (1980) in this the 9th year of the case. Misapplication of statutes,[5]

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occurred." Leaving open a TIA, if applicable then, under Title 41 where jurisdiction would take place under Section 41-3-103(1). 41-3-103(1)(c) could not have applied to Appellant during putativeness because he, under circumstances of the situation at that time, could not have been directly involved in father-child neglect or dependency alleged."

The State and the Guardian Ad Litem even went so far as to pull a "potential adoption" as a reason to terminate Appellant's Parental Rights. This was rejected by Mt.Sup.Ct. 81-523 appeal.

The State preferred to substitute a right to due process for the right to parent a child in an automatic challenge.

3/ Violates meaning of Stanley v. Illinois, 405 US 645 (1972) and Santosky v. Kramer, 455 US 745 (1982).

4/ such automatic challenge is proscribed by Stanley v. Illinois, supra.

5/ Title 40 Parental Rights termination procedures.

specifically being referred to as unconstitutional, was an issue raised by Appellant early on (1981). From Appellant's brief of June 1981 filed with lower court before its decision, the following is quoted[6]:

> "Evidence produced at trial was nothing more than speculation. To terminate Mr. Fitzgerald's parental rights based upon said evidence would be to deny his constitutional right to due process and would render application of Uniform Parentage Act (Title 40, Chapter 6 Part 1, MCA), in this particular case, a violation of Mr. Fitzgerald's constitutional rights."7/ ins.add.

Text of the brief went on to say:

> "The language found in the decision of Fierro v. Ljubicich, 5 Misc.2d 202 (1957) summarizes the test to be applied in cases of this nature:
> 'The fundamental principal (is) no Court can, for any but the gravest reasons, transfer a child from its natural parent to any other person, since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the

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6/ June 1981 Brief In Support Of Position Of Frank B. Fitzgerald, DJ-79-188.

7/ 9th and 10th Amendment Rights reserved in the people--6th and 7th Amendment Right to a fair trial--1st Amendment Right to determine religion for one's family--5th and 14th Amendment Right to due process.

reach of any Court.'"8/ ins.add.

Earlier (October 1980), Appellant filed a Motion to Dismiss and Objection to Consolidation with lower court stating:

> "Since the State has privously filed an 'Abuse and Neglect' Petition (under Title 41, MCA), the rights of Frank B. Fitzgerald would be infringed upon if he was forced to not only defend his position in that action, but simultaneously deal with the Petition of the Guardian Ad Litem (who illegally filed to terminate father's parental rights under Ti-

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8/ This Court has adhered to this principle in many decisions. For example, in Stanley v. Illinois, supra, this Court stated: "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', Meyer v. Nebraska, 262 US 390, 399 (1923); (are) 'basic civil rights of man', Skinner v. Oklahoma, 316 US 535, 541 (1942); (are) 'rights far more precious. . .than property rights', May v. Anderson, 345 US 528, 533 (1953)." "'It is cardinal with us, the custody, care and nurture of the child reside first in the parents, whose primary function and freedon include preparation for obligations the state can neither supply nor hinder', Prince v. Massachusetts, 321 US 15, 166 (1944)."

The gravest reasons doctrine suggests, cases involving alleged child abuse, neglect or dependency of Title 41, MCA, should be given far greater procedural safeguards than is presently afforded. Civil Parental Rights termination proceedings should give way to criminal proceedings where far greater safeguards are afforded by tradition. So much has been wrong in this case and thousands like it as to be beyond the scope of this Presentation.

tle 40)".9/ ins.add.

Appellant again raised it, by implication, on appeal Issue 1 answered in Mt.-Sup.Ct. opinion (81-523) which stated:

> "Appellant claims 40-6-128 and 40-6-130, MCA, should not have been applied to him, and District Court therefore erred by terminating his parental rights absent any findings of abuse or neglect. We agree and remand for further findings."10,11/

This Court has touched briefly upon question of civil versus criminal procedures in termination cases: "...in the Indian Child Welfare Act of 1978, 25 USC 1912(f), Congress requires 'evidence beyond a reasonable doubt' for termination of Indian parental rights, reasoning that 'the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty...' H.R. Rep. No. 95-1386, p.22 (1978)." Santosky v. Kramer, 455 US 745 (1982). It is not so much a question of evidence as procedural and Rights safeguards.

"The right of a parent. . .a fundamental one" doctrine suggests a confirmation of Rights reserved in the people causes of the 9th and 10th Amendments.

9/ Illegality of Guardian's action to seek termination of Parental Rights was confirmed on appeal (81-523).

10/ Opinion (81-523) ruled: "Section 40-6-128, MCA, did not give Guardian Ad Litem right to petition for termination of appellant's parental rights." "District court erred by consolidating Guardian's petition with that of SRS (the State)". ins.add.

11/ The State filed its civil allegations under Title 41, MCA, and with the Guardian Ad Litem un-

Appellant again raised it, by implication, on appeal Specification of error No. 4 (86-538):

> "The trial court used the 'best interests of the child test' for determining custody of the minor child."12/

The record in this case fails to reflect the whole truth, the whole story. It does not reflect what the State tried in its zeal to win and conceal.[13] In a word,

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der Title 40, consolidation of these two positions ruled illegal, Constitutionality of any and all procedures are challenged.

Misapplication of statutes, said to be unconstitutional by Appellant, was denied by 1st judge's DJ-79-188 June 29, 1981 Order: "3. Motion of Frank B. Fitzgerald to dismiss these proceedings on the ground Uniform Parentage Act (Title 40, Chapter 6, Part 1, MCA) is unconstitutional is denied." ins.add. Upon reversal by appeal, that issue was again alive and the new judge could have, as further findings, ordered by the remittitur, determined the misapplication of the statutes was unconstitutional and he could have ordered the case dismissed as prayed for originally.

12/ "best interests" does not follow Title 41 but Title 40, previously ruled err.

13/ Appellant's child has belonged to a stranger, parens patriae, by force and effect of law, under color of law.

In Santosky, supra, this Court recognized the importance of safeguards and what the State could do given the right circumstances of a case: "...the primary witnesses (for the State) at the

Appellant was set up--to fit State's plans already in place--to maintain the child in foster-care without termination of Appellant's Parental Rights but allowing occassional visits.[14]

Montana's Supreme Court erred, and its actions unconstitutional by its not recognizing, the State and lower court wrongfully permited continuation of the Guardian Ad Litem to side with the State in con-

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hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the state even has the power to shape the historical events that form the basis for termination."

Striking observations in Santosky point up problems the State presents to parents in civil proceedings to terminate, such as "double jeopardy", which, in effect, is what happened after the State lost in a reversal in Montana's Supreme Court and a new judge ordered a new trial, even in face of its denial by the high court.

14/ State's plan was reveal several years ago in a conversation between Appellant and George Bulatowicz, case social worker. Appellant did not at the time take seriously the State trying to parallel parens patriae with Parental Rights. Without access to State secrets (most of discovery was denied), Appellant had to clandestinely learn of State's actions behind the scenes.

solidated proceedings,[15] and for him to act from the beginning as second prosecutor with ability to freely challenge the parent-child relationship in adversity as if parent and child were adversaries contrary to this Court's common law holding, the State may not adhere to the premise the parent and child are adversaries until the court first finds the parent unfit to parent.[16]

There is little or no difference between consolidated proceedings where Guardian Ad Litem and the State are co-prosecutors and proceedings not so labelled consolidated in which co-prosecution exists on a practice of application.[17] Thus, Appellant was

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15/ Consolidated proceedings were declared error in Opinion 81-523 Mt.Sup.Ct.

16/ Santosky, supra, took note of significance of New York law, stating: At factfinding, the State cannot assume a child and his parents are adversaries..." "But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."

17/ This has been the truth of this case. It is obvious from a reading of every brief ever filed by the State and Guardian Ad Litem.

denied a Constitutional Right to a fair trial from the beginning and thruout this 9th year case.

2. THE STATE AND LOWER COURT WENT FIRST TO BEST INTERESTS OF THE CHILD THRU-OUT THIS CASE, ABSENT FIRST FIND PARENT UNFIT.

The many decisions of this Court call for 5 points in common law to be followed by the courts in the trial of the first instance. Additionally, common law of this Court has called for that trial to be bi-furcated into hearings first on parent, or parents, then on the child. That amounts to first find the parent, or parents, un-fit to parent, then go to the best inter-ests of the child, not the other way around.

The 5 points in common law are: lst, a full and fair evidentiary hearing must be afforded each parent on a lawful State challenge to a given Parent's Rights. It is not correct to hear evidence at the

trial of the parent on the best interests of the child. 2nd, if that parent is found by "clear and convincing evidence" to be unfit to parent, then terminate that parent's Rights. 3rd, if that parent's rights are terminated and if there is a lawful challenge to the other parent's Rights, repeat points 1 & 2 for the other parent before moving on to point 4. 4th, hear evidence on the best interests of the child only after both parents are terminated. 5th, decide what are the best interests of the child and implement that decision.

On points 1, 2, & 3, the Guardian Ad Litem's duty to the child as his client is to guard the child's Rights to its parent from encroachment by the State. Then on points 4 & 5 to actively participate as an adversary to the parents in his client's best interests.

Montana's Supreme Court erred, and its actions unconstitutional, by its not rec-

ognizing, lower court went only to the best interests of the child in the first place[18] and permitted the State, thruout this 9th year case, to enforce its view of what constituted best interests of the child and that the State view can prevale, even absent the prerequisite proper hearings leading to conclusive jurisdictional decision of parental unfitness.[19]

By its actions Montana's Supreme Court gave unconstitutional approval to State placement of the child in continuous 11 year temporary foster-care, a violation of the child's rights to be parented by a parent, a violation of federal law[20] and intent of Congress.[21]

18/ The termination of maternal Parental Rights are not challenged here alto there is much to complain of in her termination.

19/ Whether by the expression "best interests of the child" or by any other phrase, the meaning is the same; subversion of Parental Rights by the judge with the State and the Guardian joining in.

20/ State of Maryland complied with federal law and devised programs to return children to their families.

21/ Intend of Congress was to establish programs assisting return of foster-care children to their natural families soon as possible after removal.

By its actions it gave unconstitutional strategic approval to State's presumption, State ordered foster-care placement would have been jeopardized and against best interests of the child if parental interference in that placement succeeded thru his litigation, his visits, his desires to be family, and blood relatives desires they be family, all, said to cause the child to be dependent and a "youth in need of care", thereby.[22]

3. STAY ORDERS AND DECISION ON FIRST APPEAL WERE DISREGARDED. APPELLATE COURT FOUND NO EVIDENCE IN RECORD HARM WOULD COME TO CHILD ON VISITS OR LIVING WITH APPELLANT.

Stay orders are intended to prevent enforcement of a court decision and orders which issue as a result of that decision.[23] In this case, two Mt.Sup.Ct. Stay

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22/ The youth has been and is to be so, in need of care, only because of being in hands of the State for 11 years.

23/ State and private agency actions suggest otherwise. "Civil" stay orders can be ignored?

Orders and its Reversal Decision were violated by both the lower court and the State.[24] It can be seen, the State and the private agency proceeded as if no Stay Orders or Reversal Opinion were issued. The child was given to the private agency having a very loud voice,[25] Moved 300 miles, given a new name, a new religion and it has been that way ever since.[26]

Mt.Sup.Ct Opinion reversed those lower court orders but the proper events flowing from those reversed orders never came about. Not only was that contemptous but unconstitutional.

24/ But can the State, the lower court, and the private agency ignor a reversal by Mt.Sup.Ct.?

25/ For years after 81-523 reversal, nothing changed.

With $400 million in assests, the private agency was heard all the way into the Governor's mansion and into the halls of the legislature where they adopted into law, Title 41, Chapter 3, Part 6, as a parallel to or as a substitute for any sections of Part 1 ruled unconstitutional. It was a pet project of a state senator, who at the very same time was the private agency's legal representative.

26/ It violate nearly all provisions of the Constitution designed to protect people's Rights from encroachment of this kind.

Long before Montana's Supreme Court Stay Orders and its Opinion reversed lower court, his child was unconstitutionally detained as a ward of the State, because, it was alleged, detention in foster care was in the child's best interest. That flies in the face of the fact the child was put into an environment far worse[27] than anything Appellant could possibly have provided or by any of the child's many blood relatives willing to assume temporary responsibility or the duly appointed "godmother",[28] ready, willing and able to assume that responsibility. The presumptive reasons of the State and the court for detaining the child in foster care, said to be in its best interests,

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27/ For the tragedy of the child's first foster care providers, see Appendix G, the Phillips Notarized Statement about the child's experiences.

28/ A duly appointed "Godmother" was status of a person known to the child all of its life, admitted to by both the State and the Guardian Ad Litem.

are just not real.[29] Detention of Appellant's child in foster care for 11 years, 8 years in private agency hands constitutes cruel and unusual punishment for the child[30] within the meaning and intent of the 8th Amendment.

Because of that detention, the child[31] will not know depth of love, kindness, affection, concern, emotions, humanity, and right from wrong.[32]

Because of that detention, certain genetic factors the State was fully aware of, were not timely attended to and Appellant was prevented from fulfilling his paternal responsibilities[33] to his child to see those factors were timely attended

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29/ These notions exist in symbolic language and headstrong ideas of some social workers who support a system which could be described as a carbon copy of Nazi Germany, lebensborn.
30/ And for the parent.
31/ Deprived thereby of equal protection of law.
32/ Especially the depth possessed of its natural father who loves his child more than life or any property and who has spend his life's savings and much of those of his family on this most important issue of wrongful detention.
33/ 9th and 10th Amendment Rights reserved in the people.

to as needed. Thus, the child has suffered while in the hands of the State and the private agency.[34]

Appellant is a scientist,[35] adhering to scientific priniciples and attitudes. Following in the family tradition, he should have been able to pass on his knowledge to his child, knowing the child would be able to understand this knowledge. Acceptance of ideas, family tradition, knowledge, philosophy, religion and all of the other attributes of human development largely depend on the environment the child finds itself in. Appellant's child cannot learn its father's ideas while totally alienated from him in foster care devoted to vastly

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34/ To what extent the child has suffered is already apparent, cite the outcome of two 3 week visits.

And to what greater extent may not become certain until the child eventually has a family and children. The State blames the parent--the parent blames the State.

35/ He is a charter member of The Planetary Society, holder of the Bausch and Laumb Honorary Science Award, has contributed to society in the field of radio-communications, and holds an Honorable Discharge from the US Army.

different ideas.[36]

Compare, Appellant has a large library of videos, many on science, on meaning of the universe, the planets, the stars, the blade of grass, the grain of sand, animals in the wild, mating calls of birds, songs of hump-back whales, computers, food-chains, and so much more to learn,[37] compare that, with, "they don't even have a TV set" but have rows of folding chairs in their living room for follow travelers in fundamentalist prayer service.[38]

And they never hug one another.[39] The child is even denied that most important

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36/ MCA Title 41, Chapter 3, Part 1, 41-3-101 states the Declaration of Policy of the state of Montana and they include natural families where possible. It is Appellant's statement he was denied the possibility of any family with children as a direct result of unconstitutional actions of the State interference into his family. Appellant wants children in his family, to be free to raise a family, without some sort of reversal he will have to emigrate.

37/ He knows library research also.

38/ This religion is not Appellant's nor any of his family.

39/ Hugging is the best way for humans to transmit non-sexual signals of love, devotion, and affection.

quality of human togetherness.[40]

As surely as if the child were in a reformatory, foster care cannot provide the stuff of life the child requires and deserves.[41] This is so because of State's unconstitutional intervention into its childhood, effectively punishing it over State's fraudulent automatic allegation against the father, "he is unable to provide proper care and supervision".[42]

4. "LEAST RESTRICTIVE" AND OTHER PROVISIONS OF USCS 42-601 ET SEQ. WERE DISREGARDED: APPELLANT'S CHILD GIVEN A NEW NAME, NEW RELIGION, 300 MILE DISTANCE, NO VISITS AND FOSTER CARE FOR HALF HER LIFE.

Pursuant to order of the court June

40/ Some State staff on this case feel contrary. Some have felt, as a general principle, hugging conveys sexual expressions.

41/ Parens patriae is but a stranger without ability to either create nor sever genetic and human bonds we all require on this planet as human beings to survive. Meaning derived from Lehr v. Robertson, US Supreme Court No. 81-1756 (1983), p12 lines 18 & 19: "The actions of judges neither create nor sever genetic bonds."

42/ Automatic allegations requiring child in long-term foster care violates nearly every US Supreme Court case on such subject.

29, 1981 terminating Appellant's Parental Rights in the best interests of the child, reversed on appeal, Appellant's child was given to the State who gave her to a private agency on or about October 1981.

After two appeals of benefit to Appellant Rights, another court order, September 2, 1986, disregarded those Rights and assigned the child foster care until she is 18.

Provisions of USCS Title 42-601, et seq. became operative when the State accepted matching funds for foster care of Appellant's child. Due to way this case was handled, "Least restrictive" provisions have been disregarded under color of law.

The child was moved 300 miles to isolate her in permanent foster care, from all blood relatives, godmother and friends. She was forced to accept yet another religion. Trauma was inflected. At one point, as she grew older, she viewed her situation as a "prison".

Montana's Supreme Court erred, and its actions unconstitutional, by its not recognizing, the State, by circumstances of the case, was able to permit and to cause production of, and utilization of, case historical developments detrimental[43] to the parent-child relationship thru close State, private agency, and foster care provider control of the child.

The State maintained this close control in full view of Mt.Sup.Ct. Stay Orders[44] and reversing Opinions,[45] and the 1st Amendment Right of a parent to decide the child's religion.[46]

43/ See Phillips notorized statement, Appendix G, for historical developments detrimental to the parent-child relationship. The 1st fostercare mother has come forward to reveal a trauma Appellant's child suffered while in the hands of the State.

44/ Mt.Sup.Ct. 81-523 Stay Orders April 15 and May 13, 1982 staying DJ-79-188 decision giving Appellant's child to SRS in her best interests absent prerequisite finding of Parental unfitness.

45/ Mt.Sup.Ct. 81-523, 654 P2 994, "District Court judgment is reversed and remanded for further findings", and 83-120 denial of petitions of County Attorney, April 28, 1983.

46/ Religious Right was recognized by SRS. Former Department of Social and Rehabilitation Services had policy guidelines which directed, foster chil-

Blood relatives had no say in the foster care placement. They were not consulted nor were their recommendations honored.

As to other federal laws disregarded, the private agency bought her airline tickets in a fictitious foster care name. (See Appenix M.) The agency tried to obtain driver's education for her in that name, but school officials refused, admitting her only in her legal name. She was registered twice in a hospital in that name. Admitted to public school in that name. Took her across state lines 5 times in that name without the necessary state court order contemplated in MCA Title 41-3-103(1)(b).

Father was not permitted to sit on a foster care review panel. He was not offered a "treatment plan" designed to keep father and child together. But was offered an invasive plan to permit further gather-

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children shall be assigned to foster care provider families with the same religion as the religion of the child's natural family.

ing of data for use in court against the parent-child relationship. That invasive plan was objected to by Appellant's attorney.

Intent of Congress to return children to their homes was disregarded.[47]

5. JUDGE SAT 1-1/2 YEARS ON STATE MOTION FOR A NEW TRIAL DENIED BY APPELLATE COURT IN 2ND APPEAL.

Montana's Supreme Court erred, and its actions unconstitutional, effect holding harmless, lower court judge sitting on the case for over 1-1/2 years without his acting timely on State's motion for a new trial, which trial Mt.Sup.Ct. denied in ex rel Hanser v. 13th District Court, 83-120.

This delay infringed Appellant's Constitutional Right to a speedy trial[48]

47/ Right of a child to be parented by its parent is by implication, a Right reserved in the people assured by the 9th & 10th Amendments. It is also a Right recognized by all nations and is set forth in the United Nations Accord on "Rights Of The Child".

48/ Right to a speedy trial is assured by the 6th & 7th Amendments.

or to a summary judgment in his favor.[49]

If the State sought new trial was constitutional, which Appellant claims is unconstitutional in this case, he was unconstitutionally denied a full and fair hearing.[50]

49/ Summary judgment was possible given terms of Mt.Sup.Ct. 81-523 Opinion Reversing And Remanding For Further Findings.

50/ The judge heard the challenge from the State. However, he did not hear the challenge from the Guardian Ad Litem who was prepared to call a list of witnesses aimed at termination, siding with the State as a 2nd prosecutor. This disregarded the Santosky principle of the State cannot assume a child and parent are adversaries until parent found unfit; and Santosky risk of error principle.

From Santosky, citing the 1st of the Eldridge factors--the private interest affected, "The fact-finding does not support--and is not intended--to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents." Santosky v. Kramer, supra at p13 of 80-5889. (Contrast that statement by this Court with one used by GAL in his briefs where he wrongly alluded to Montana Constitution Article II, Section 15, when he said, "It is obvious, based upon the cited statutory and constitutional authority, a youth in the state of Montana has a right to seek his or her own safety, health and happiness in as adequate an environment as is reasonably available.")

It can be seen from Santosky and many others, a hearing pits the State directly against the parents. It is unconsciencable for the GAL to auto-

One can waive certain application of Rights, one can even waive certain Rights themselves. Not all Rights can be so waived. The Right to be a free person cannot be waived in favor of slavery or death. This is so because certain Rights are not only reserved in the people but are fundamental Human Rights challengable only by the strictest of rules of procedural due process safeguards and correct judicial conduct. Such was lacking in this case when the judge chose to hear the challenge but not the defense.

An indecisive judge,[51] he opt for a settlement because he could not balance Rights of Appellant against parens patriae. This acted against fundamental fair-

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matically side with the State; to present his version of a 2nd prosecution packing the record. Such has been the situation here in the 13th state judicial district with his monopoly on GAL assignments.

51/ The judge was indecisive; it took him 1-1/2 years to grant the State's motion for a new trial. Apparently, he could not make a decision on basis of a "cold" record, which coldness he was responsible for.

ness.[52]

> "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." "The fact that important liberty interests of the child. . .may also be affected. . .does not justify denying the natural parents constitutionally adequate procedures." Nor can the State refuse to provide natural parents adequate procedural safeguards on the ground that the family unit has broken down..."53/

To do so is to relinguish Appellant's Right to a full and fair trial[54] and the judge to relinguish his personal jurisdiction of Appellant over to a private agency to implement their view of visits.[55] These

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52/ To fail to provide adequate procedural safeguards is color of law.

53/ Santosky v. Kramer, supra, a p7 of 80-5889.

54/ Appellant has never relinguished his Right to his child. The purpose of any constitutionally authorized State challenge to that Right must include a full and fair trial to a conclusive determination as to parental unfitnes and the termination of Parental Rights or dismiss the case. Parental Rights are Human Rights to be freely exercisable or terminated by rule of law.

Trapping of Appellant and his family in those unusual circumstances of the case they found themselves in at the time has resulted in disregard for their fundamental Human Rights under color of law.

55/ the judge has not acted on submitted visitation proposals he asked for over a year ago. Any, visits are now the arrangement at the pleasure of

were done in the name of best interests of the child thru the eyes of the State and the private agency.[56]

As to what if? What if a new trial were to have been finished with an adequate defense as well as challenge? Would the results have been the same? Appellant does not have to answer one way or another, but, he was prepared with many witnesses including experts in many fields to provide testimony a full and fair trial was required to hear.[57]

6. STIPULATION, PUT INTO PLACE WITHOUT COURT ORDER, WAS IN NATURE OF A BILL OF

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the private agency who prefers visits take place only twice a year. If visits cannot take place in less than 6 months, that constitutes abandonment subject to permanent custody in private agency.

56/ Largely because the judge has refused to act on visitation.

57/ A full and fair hearing, if constitutional, would have admitted into evidence crucial defense expert reports and testimony. See Appendix I-A & I-B as examples of such expert reports, of many. 2 others were forced into the hands of the State and GAL under discovery. They were favorable to defense but never used in court nor did they play any part in the judge's decision who refused to allow them into the record by his demand for a settlement.

ATTAINDER, AND, IN NATURE OF EXECUTORY CONTRACT ADOPTION.

Montana's Supreme Court erred, and its actions unconstitutional, when it declined to rehear its opinion when, among others, the question was raised, the Stipulation ordered by lower court[58] was in the nature of a Bill of Attainder in violation of Article I Sec. 10 of the U.S. Constitution.[59] It was in the nature of an Executory Contract Placement nearly identical to an Executory Contract Adoption prohibited by a trilogy of state supreme

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58/ After the fact taking the form of ex post facto.

59/ Montana statutes do not provide for a Stipulation to be a pseudo-termination to take the place of relinguishment or findings of unfitness because of abuse, neglect or dependency. The court's requiring a settlement later to take the form of the Stipulation was the making of law (enactment of which is a legislative act) by the court. The Stipulation labelled Appellant as one the target of the Stipulation and effectively directing a verdict of guilt without trial of the first instance at which trial Appellant could, if evidence so indicated, be found guilty or not. Documentary labelling one guilty without a due process trial takes the form of a Bill Of Attainder, by definition.

court cases[60] holding such Contracts were prohibited and which cases cited only two ways in the statutes to terminate Parental Rights: Relinguishment; or, finding the parent guilty of abuse, neglect, or causing dependency.[61] Appellant has never agreed to relinguishment under any circumstances.

Effect of allowing the Stipulation to

60/ Trilogy of Mt.Sup.Ct. cases eluding to the only two statutory procedures to end Parental Rights: Henderson v. Henderson, 568 P2 177 (1973); In Matter of Doney, 570 P2 575 (1977); In Guardianship of Aschenbrenner, 597 P2 1156 (1979).

61/ It would be a factual dispute if anyone says Appellant agreed via the Stipulation to one or both statutory methods of termination. It is clear from the Order DJ-79-188 of September 2, 1986, Appendix C, pages 6 & 7, paragraphs 3, 4, & 5, and from a reading of Mt.Sup.Ct. appeal and Opinion, altho Montana's Supreme Court found no reason to doubt the lower court applied 41-3-102, MCA, simply because the trial of the first instance was not a full and fair and evidence was one sided due to lack of proper procedures which granted only a prosecution, at no time was Appellant's Parental Rights conclusively terminated. Absent termination of Parental Rights by due process, he was only de facto said to be guilty of abuse, neglect or dependency which in and of itself, given the circumstances of a conclusive due process trial determination of guilt, by statute requires the termination of Parental Rights. Therefore he has not been declared unfit to parent his own child. The holding of his child in foster care now and into the 11th year is unconstitutional.

stand, is to create a new extra-statutory 3rd class of Parental Rights termination proceedings which creation violates separation of powers clause.[62] [63]

Additionally, the Stipulation came about as a result of a new trial which new trial was denied to County Attorney by Montana's Supreme Court in 83-120.[64] The lower

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62/ Montana's Constitution adheres to the separation of powers.

63/ Another effect of allowing the stipulation to stand, is to permit the adoption of Appellant's child by strangers without further hearings to terminate his Parental Rights under a scheme of labeling his ineffectual Parental Rights and his permitted minimal visitation, directably less than permitted by Montana statute definition of abandonment all as causing dependency fitting that definition.

If the argument were advanced, there is always another Part, 6, to Chapter 3, Title 41 under which Appellant's Rights are assured, this Court should be aware, no matter how seemingly protective of Rights Part 6 is said to be, the fact remains, Part 6 was written by the very same man who provides legal representation to the private agency who has Appellant's child in foster care; an apparent conflict of interest since he knew full well of the possibility Part 1, being challenged at the time by Appellant, might be declared unconstitutional, hence Part 6 was a backup statute.

64/ County Attorney, in his March 10, 1983 Memo in Support of Petition, Issue III, to his appeal asking for a new trial, admitted 2nd judge was without jurisdiction to order a new trial, yet he asked for and got it 1 - 1/2 years later.

court's granting of a new trial over denial by Montana's Supreme Court, violated due process clauses of 5th and 14th Amendments.

Thus, the Stipulation and incomplete adversarial proceedings leading to the Stipulation are unconstitutional.[65] [66]

7. APPELLATE COURT ALLOWED "CLEAR AND CONVINCING EVIDENCE" DOCTRINE DID NOT REQUIRE FULL AND FAIR TRIAL BUT RELIED UPON STATE EVIDENCE ABSENT DEFENSE.

Montana's Supreme Court erred, and its actions unconstitutional, in view of fact not all of the evidence nor all of the hearings were heard, when it declined to review correctness, substantiality and

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65/ The 2nd judge disobeyed his Mt.Sup.Ct.'s Order denying County Attorney his new trial. The judge may not have known of the Order because none of the briefs, motions or oral auguments on the record contained reference to that (83-120) Order.

66/ The Stipulation came about as a result of two things: An illegal new trial, which trial did not contain a defense; and, a judge who refused to hear the defense instead telling the 3 sides to bring him a settlement he could sign or, "I'll write a decision no one can appeal." A phrase heard out in the courtroom spoken in chambers.

completeness of evidence and evidentiary hearings, in spite of both common law of Montana and common law of this Court to the contrary, lower court was not required to afford Appellant a full and fair trial to a completion.[67]

Montana's Supreme Court rendered its opinion (86-538) heavily relying on testimony of State witnesses whereas incomplete hearings afforded defense only one witness, out of many.[68]

Montana's Supreme Court did not comply with its own and US Supreme Court requirements, "clear and convincing evidence", missing from Montana statutes, requires a full and fair hearing in which an adequate defense shall be afforded.

8. INFRINGEMENT OF RIGHTS WAS NOT SUFFICIENTLY DRASTIC TO INVOKE CONSTITUTIONAL PROTECTIONS.

67/ Assuming a new trial were constitutional in view of Mt.Sup.Ct. denial (83-120) and Appellant's Rights violated in the 1st place.

68/ The one character witness for Appellant was called out of order by consent.

Montana's Supreme Court opinion erred, and was unconstitutional, in holding, in effect, Infringement of Parental Human Rights[69] by lower court was not sufficiently drastic to be in violation of due process clauses of the 5th and 14th Amendments; fair trial, speedy trial clauses of the 6th and 7th, when judge called for a settlement instead of affording Appellant[70] a full evidentiary bifurcated[71] hearing so as to reach its correct decision.[72]

69/ Rights reserved in the people by the 9th and 10 Amendments.

70/ Appellant was fully prepared to call over a hundred witnesses to testify including experts of his choice to rebut the State's and Guardian ad Litem's joint position to terminate.

71/ Motion for bifurcated hearings was granted in December 1984.

72/ From the beginning in 1980, misapplication of Title 40, MCA, termination, prejudicial actions without court ordered paternity, failure to follow common law procedures (statutes defining procedures do not follow common law), confusion as to meaning of Title 40, applicable or not applicable to Appellant at the time, the judge overruling strong objections the Title 40 actions and consolidation procedures were unconstitional, all this lead to the June 29, 1981 DJ-[illegible]-188 Decision denying unconstitutional application of Title 40 to Appellant. That denial was reversed upon appea

Vagueness of Titles 40 and 41, MCA, and the practice in applying them, are repugnant to the Constitution and have led to great confusion among the three sides of this case and have prolonged this case going on 9 years.[73] Appellant was thus only afforded partial due process in State's challenge to Rights reserved in

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(81-523) making that constitutional issue of due process alive again and in view of fact the 2nd judge ordered a new trial in spite of his Supreme Court's denial of a new trial, it has never died since.

Complying with the remittitur, the 2nd judge could have made further findings which went to the issue of unconstitutionality of misapplication of Title 40 to Appellant and rendered judgment accordingly. He could have dismissed the case or issued a summary judgment in favor of Appellant, all instead of ordering an illegal new trial which resulted in the judge refusing to hear anymore of the case, opting for a settlement.

73/ The list of what is wrong with Titles 40 and 41, MCA, is long. Appellant counts at least 28 wrongs.

And the most important element is the impact termination has upon the family. Such cases often result in grave and grievous pain worse than in any divorce, especially to children. Often far worse than death in the blood line. Therefore, the constitutionality of lax civil (versus tight criminal) termination procedures of the statutes is challenged. The constitutionality of historical developments which bureaucratically flow from permissivity, laxiety, assumptiveness, and vagueness of the civil statutes is also contested.

the people.[74]

The Right to a full and fair trial,[75] which seeks to end Parental Rights, cannot be constitutionally terminated on desires of the judge part way thru a hearing simply because he feels the case is too complicated, too difficult or he cannot, tho he feels he must, balance Parental Rights against rights of the State nor against Rights of the child.[76] Nor because he

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74/ 9th and 10th Amendment Rights.

75/ If statutes required and permitted but criminal Parental Rights allegations and terminations, society, the State, and judges would be more inclined to presume innocence until proven guilty and those trials would impose the omniscience of constitutional safeguards now missing in civil adversarial proceedings. Meaning to be derived from Santosky, supra.

There are those who would say the uniformity of applying far more stringent safeguard requirements to terminate Parental Rights, violates state's rights to decide for its population, whether by experience or experiment, what constitutes safeguards. The simple answer is that this thesis has not worked to afford equal protection of law. This case at bar is one case in point and there are thousands of others, with more to come as a psuedo-nazi-like movement grows to get those parents who are suspected of abuse, neglect or dependency and take charge of lives of the children who then become dedicated to the premise, "the state can do no wrong".

76/ Meaning derived from Fierro v. Ljubicich, supra.

wants to substitute his non statutory settlement for a complete, full and fair trial.[77]

Montana permits the courts by statutes only two ways to terminate Parental Rights.[78] A settlement is not one of them. Appellant did not marry the State only to wind up in a divorce joint custody case. He has never agreed to relinguishment[79] nor has his Parental Rights been conclusively terminated.[80]

For purposes of ascertaining if infringement of Rights was or was not sufficiently drastic to invoke constitutional protections, Appellant wishes to bring to

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77/ The trial judge is without discretion, on or off the record, to call for a settlement leaving Appellant's child in foster care without affording him a full and fair hearing and without termination of his Parental Rights which in and of itself constitutionally requires a full and fair hearing.
78/ By relinguishment or by termination after trial on States allegations of abuse, neglect or dependency.
79/ Alto he was pressured many times into giving up.
80/ See Appendix C, pages 6 and 7, paragraphs 3, 4, & 5.

the attention of this Court the precise places in Title 41 where the "the best interests of the child" are referred to in terms to suggest they are paramount, under color of law, to Parental Rights and to constitutional safeguards and protections which require of the State first find the parent unfit to parent then go to the best interests of the child. Please refer to Appendix L for Title 40 & 41 quotes.

Title 41-3-101, Declaration of policy, begins the series of "best interests of the child" thru allegations of child abuse, neglect, and dependency whether directed at someone or simply said to exist, directed at no one.

In 41-3-101, deciding what constitutes welfare of the child, insuring the child be afforded an adequate environment and other parameters of life, largely is left to those whose feel they fulfill state policy. That is not necessarily the court, especially at the beginning of any given

case of alleged, anything.

In 41-3-102, Definitions, the problem is compounded with such words as, "normal", "harmed or threatened with harm", "excessive", "adequate", "risk of harm", "destitute", "dependent upon public support".

It is those whose feel they fulfill state policy, along with others in the community working for them, who pose a real danger of over-zeal to protect the child at the expense of parental rights.

These words apply stereotypal; every one is compared to some ideal model by system workers. Once inside the family, the prime motive of the State is to set aside parental rights and go directly to what they perceive to be "the best interests of the child". That begins the process, looking very much like lebensborn.

An allegation, petition, affirmative affidavit in support of a petition, or recommendations, goes around constitutional rights of parents directly to best in-

terests of the child as if the allegation were the truth. Truth of the allegation is what an evidentiary factfinding proceeding is designed to discover.

Notice 41-3-401(1) covers in general the filing of all petitions alleging abuse, neglect, and dependency and sets the conditions for branching in (10) (a-d).

41-3-401(10)(d) goes directly to best interests of the child.

It is justice for the State only to ask for court action, as relief prayed for, upon what the State can prove, in this case, by "clear and convincing evidence". That conforms to the lawful State challenge principle.

But notice in total of 41-3-401 a petition is not necessarily directed at a parent.

This case presents a situation where the putative father, Appellant, was not named as the one "committing" anything against the child, only that while the child was

ward of the State, it was in need of care. See TIA May 28, 1980.

Thus, while the State had that allegation of the child in need of care, it was not drastic enough to invoke constitutional protections of Appellant against unreasonable search and seisure (stipulations of invasion of his privacy).

41-3-401(7) gives to any person interested in Appellant's cause the right to appear, yet Appellant's witnesses, including his wife, were excluded from appearing in his behalf. Not drastic enough to invoke.

41-3-402 does not require the allegations of a petition be directed at anyone. Only that the allegations are facts.

41-3-403(2)(f); 41-3-404(4)(b); 41-3-406(5); 41-3-408(6)(d); 41-3-602; 41-3-607(3); 41-3-609(3); 41-3-610(2) speak to the best interests of the child.

41-3-607(4) prevents invoking the right to jury trial.

41-3-609(c)(i) an appropriate "treatment plan", under 41-3-603(4), was never introduced in this case because Parts 1 & 4 prevaled over Part 6. This "treatment plan" is required of USCS Title 42 Sections 601, et seq which deals with foster care matching funds.

USCS Title 42-601 et seq also requires the sitting of a parent on the foster care review committee. This has never been permitted in Montana and is intentionally omitted from MCA Title 41-3-1115. Inaction to implement intent of Congress on this matter was not drastic enough to have invoked federal sanctions against Montana. But this refusal to even permit Appellant on the committee compounded the parent-child relationship by a lack of communication to authority thru channels of those parental concerns created by foster care.

While some of the places in Title 41 where best interests are referred to are put in place after termination of parental

rights, the 5 points of common law, which must be followed before the best interests of the child are implemented, are not found in any Part of Title 41, Chapter 3, nor any combination of those Parts, nor in Title 40, Chapter Part 1.

Application of Title 41-3-101, et seq to Appellant apparently was not drastic enough to invoke his constitutional protections.

Title 40-6-130 contains best interests. A simple preponderance of the evidence is all that us required of the standard used by the courts in Title 40-6-101 et seq.

Illegal application of Title 40-6-101, et seq., by the Guardian Ad Litem in his bid for Appellant's Parental Rights termination, to Appellant apparantly was not drastic enough to invoke Appellant's constitutional protections.

If any one application of state statutes to Appellant was ruled error, in this case, this Court should view this as a

serious infringement and to warrant consideration as drastic enough to have invoked constitutional safeguards and protections for Appellant's Parental Rights. Application of Title 40-6-128 and 130 to Appellant was ruled error (unappealed) by Mt.Sup.Ct. in 81-523.

Likewise, and the reason Title 40 was used against Appellant, Guardian Ad Litem's siding with the State, in GAL's use of Title 40 termination cause, was ruled error by Mt.Sup.Ct. in 81-523, simply because he had no standing (unappealed). This too should be viewed as serious enough to warrant consideration as drastic enough to have invoked constititutional safeguards and protections of Appellant's Rights.

IN CONCLUSION

Those are briefly some of the problems encountered in application of Titles 40 and 41 to Appellant over the years. This

says little about the effects upon those whose lives were adversely affected.

This has been a lengthy case which should have been resolved in Appellant's favor in as short a time as it took to exercise police powers of the State in the first place.

We have seen gross misapplication of unjust statutes, depriving a child of its childhood with its own parent, Appellant, who has never had his Parental Rights conclusively terminated, only that it was better the child reside in foster care of State and private agency choice. Where the child prefers to live is not an issue for consideration by a competent court of jurisdiction until both of the child's parents' parental rights are terminated conclusively.

RELIEF PRAYED FOR

Relief prayed for is to return the case to lower court for further proceedings not

inconsistent with this Court's Opinion, and Order, directing, the child be returned to Appellant with minimal supervision and interference to assure a stable transfer of custody of his child from the State to her rightful family.

Would you allow, without termination of parental rights, a change in a child's home because the State and private agency personages feel the child would be better off where they said?

It is respectfully submitted, the "Whittling" away of constitutional rights by governmental agencies and private agencies, on the ground encroachment is not substantial enough to warrant the application of constitutional safeguards and protections, is void under the "Due Process clauses of the 5th and 14th Amendments and should be stopped by bringing this Court's review on Appeal from Montana Supreme Court or in the Alternative, Count One, that these papers be treated as a Petition

for a Writ Of Certiorari, or, Alternative, Count Two, that these papers be treated as a Petition for a Writ Of Habeas Corpus in above entitled cause.

Dated, Billings, Montana,

December 11, 1987,

Respectfully submitted,

Frank Boring Fitzgerald

Frank Boring Fitzgerald,

Appellant, Pro Se

APPENDICES TO FOLLOW IN SEPARATE VOLUME.

AFFIDAVIT

STATE OF MONTANA)

) ss.

County of Yellowstone)

FRANK BORING FITZGERALD, being first duly sworn, hereby deposes and says:

He has personally prepared and read his APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA.

He certifies, in his judgment it is well founded.

Frank Boring Fitzgerald

Frank Boring Fitzgerald

SUBSCRIBED AND SWORN TO before me by FRANK B. FITZGERALD on this 11st day of December, 1987.

Linda Branum

Linda Branum

(SEAL)

Notary Public in State of Montana

Residing in Billings, Montana

My Commission Expires: 5/18/88

CERTIFICATE OF SERVICE

This is to Certify, I, Frank Boring Fitzgerald, have served via prepaid first class mail, the above APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA on the following persons known to be of interest in this APPEAL:

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Mt.

Gene Huntington, Director, Dept Family Services, Helena, Mt.

Dave Lewis, Director, Dept Social & Rehabilitation Services, Helena, Mt.

Harold Hanser, County Attorny, Billings, Mt.

Greg S. Mullowney, Dep.Cnty.Att., Billings, Mt.

Damon L. Gannett, Guardian Ad Litem, Billings, Mt.

Ralph L. Herriott, Former Counsel for Appellant
Billings, Mt. 59101

Dated: December 16, 1987

Frank Boring Fitzgerald

Frank Boring Fitzgerald